Filed 4/27/12 P. v. Simmons CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. PATRICK LEO SIMMONS, JR., Defendant and Appellant.	G044414 (Super. Ct. No. 10HF0528) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Patrick Donahue, Judge. Affirmed.

Jennifer L. Peabody for Defendant and Appellant, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Barry Carlton and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Patrick Leo Simmons, Jr., challenges his convictions for pimping, pandering, and misdemeanor battery. He contends the court erred by (1) failing to declare a doubt as to his competence to stand trial, and (2) wrongly admitting hearsay documents under the business records exception. But the evidence was insufficient to show defendant could not understand the trial or assist his counsel. And any error in admitting the documents was harmless. We affirm.

FACTS

The Offenses

Defendant went to an area of San Jose known for prostitution in April 2010. There he met Jane Doe, who was working as a prostitute. Defendant was standing near his green Camaro. He introduced himself as "Kash." Doe gave defendant her phone number. He asked Doe if she had a pimp; she replied she did not. Later, defendant told Doe he wanted to "look out" for her and that she could "make more money" working as a prostitute in Los Angeles.

The next day, defendant and Doe drove together to Orange County. That night, she worked as a prostitute on Harbor Boulevard while defendant waited in his Camaro. After each trick, Doe gave her earnings to defendant.

The following day, defendant told Doe he was going to post an advertisement for her on the Internet with a photograph of another woman who looked like her. Defendant gave his phone to Doe so that she could answer calls from potential customers. He told her that the customers would be asking for "Ashley" when they called. That day, a man called Doe on that phone; she answered his questions about prices and how to meet up. That night, defendant took Doe back to Harbor Boulevard to work as a prostitute.

Defendant checked into a room at a Travelodge motel with Doe the next morning. Defendant went to the lobby to post another Internet advertisement for Doe on the motel's computer for guests. Defendant left his phone with Doe. She received calls and text messages on it responding to the advertisement; she arranged to meet with customers. The next morning, defendant took Doe to a copy store where he used its computer to post more Internet advertisements for her. Doe called 911 from the car to report being beaten, but the 911 operator could not hear her.

Meanwhile, defendant had begun hitting Doe. She begged defendant to take her back to San Jose so that she could be with her son, but he refused.

Doe decided to seek help from a customer. She told one that defendant was her "pimp" and had beaten her and taken her money. She was afraid for her life. The customer asked whether her pimp was the man he saw in the lobby (and later identified as defendant); she said he was. The customer soon left and called the police for Doe.

Two police officers arrived at the Travelodge. One officer met with Doe, who was crying and bruised. The officer searched defendant and found several hundred dollars in his pocket. He also recovered a cell phone from the motel room.

The other officer examined the Travelodge computer. The Web browser history showed someone had visited several different sites: an adult Web site, a Web site called Mocospace, and "Kasmin7600's Friends." When the officer clicked on one of the links in the browser history, a Mocospace page for "Kashmin7600's Friends" appeared. The page contained pictures of defendant and his green Camaro. The officer also came across a "My Pictures" folder on the Travelodge computer, which contained defendant's photograph.

The Trial — Including Defendant's Conduct

Defendant was charged with two counts of pimping (Pen. Code, § 266h, subd. (a)),[1] one count each of pandering by procuring (§ 266i, subd. (a)(1)) and selling a person for immoral purposes (§ 266f), and three counts of misdemeanor battery (§ 242). It alleged defendant had served a prior prison term. (§ 667.5, subd. (b).)

The prosecution presented its case for three days (Sept. 27, 28, and 29) without incident. Doe testified about defendant's conduct, including his posting Internet advertisements for her. She also testified about receiving text messages and phone calls from potential customers on defendant's cell phone. The customer testified about meeting Doe — and seeing defendant walk out of her room and wait in the Travelodge lobby. The Travelodge clerk testified defendant used the motel's computer multiple times. The police officer testified about Doe's bruises and defendant's large quantity of cash. An expert explained how pimps recruit and use prostitutes. Another police officer testified about the Web sites accessed on the Travelodge computer.

On the fourth day (Sept. 30), the prosecution continued to build its case with a series of documents from Yahoo.com. A custodian of records from Yahoo testified about an e-mail account belonging to "Kashmin7600." He testified about Yahoo "Account Management Tool" documents that list basic information regarding the account. One set of Yahoo documents contained e-mails sent to the account from customers responding to Doe's Internet advertisement. Other Yahoo documents revealed the Internet protocol (IP) addresses of the computers that accessed the account and the account's profile picture: a photograph of defendant.

---

[1] All further statutory references are to the Penal Code unless otherwise stated.

But also on the fourth day, defendant repeatedly made *Marsden* motions to replace his appointed counsel.[2] The first came during the Yahoo custodian's testimony. Defendant claimed "there is a lot of false evidence in this case . . . and [defense counsel] is not doing anything about it." Defense counsel told the court about her communications with defendant, her investigation of this case, and her trial preparation. The court found defense counsel's performance showed she was "well prepared for this case," having done "a lot of research and a lot of investigation." It found no "breakdown" in her communication with defendant. And so it denied the motion.

Two more prosecution witnesses testified after that. A detective testified about documents he had subpoenaed from Yahoo, Mocospace, and a company called Backpage. He testified he called the telephone number on the Internet advertisement for Doe; defendant's cell phone rang. The prosecution also introduced records from "C M Leader Venture, Inc." showing the Travelodge computer's IP address range matched the IP address used to access the Yahoo "Kashmin 7600" account. The prosecution's last witness testified defendant slapped her and made her work as a prostitute for him. (See Evid. Code, § 1101, subd. (b).)

After his former victim testified, defendant made another *Marsden* request. He claimed defense counsel was withholding the prosecution's evidence from him. The court explained it had not yet admitted some of the exhibits, and assured him defense counsel would show him the exhibits if they were admitted. Defendant asserted there was "some corruption going on" and "a lot of lies have been brought against [him] and false documents." Defense counsel promised the court she would review the evidence with defendant. The court denied the motion.

Defendant immediately made a third *Marsden* request. He continued to complain defense counsel was "withholding" information from him. Defense counsel

---

[2] *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

explained defendant was upset she had redacted the victim's and witnesses's contact information as required by law. She conceded she had not shown defendant "a thousand pages of discovery" that had "nothing to do with [the] trial." Defendant claimed defense counsel was sharing confidential information with the prosecutor, so he fabricated evidence to see if she would disclose it. The court asked defendant if he wanted to explain, but he replied "not at this time." Defendant maintained defense counsel had lied to him "from day 1." When she denied lying, defendant responded, "I rebuke you Satan." The court denied the *Marsden* motion.

Undeterred, defendant made another *Marsden* request. The court stated: "That is denied because we had that discussion 10 minutes ago, and the court believes it is impossible that any additional information could come out in the last 10 minutes. [¶] So at the end of the day, we'll have one final Marsden motion, but we're not having one now."

The defense called its sole witness, a police officer who had cited Doe for loitering with intent to engage in prostitution. Doe did not tell her she was afraid, was being forced to work as a prostitute, or had been hit.

The court conducted a final *Marsden* hearing at the end of the day. Defendant said he wanted a new court reporter because "this woman and this D.A. winked eyes at one another." He also claimed his counsel "handed [information] right over to the D.A." He vowed not to return to court "without the FBI I contacted yesterday," who would be "present tomorrow." Defendant reported defense counsel told him "the jury has been tampered with" and "this D.A. was paying people off to come in here and witness against me." He stated defense counsel "lies about everything right now," and begged the court: "I understand this is your co-worker. I understand you guys work together, sir. I am just asking for justice." The court denied the motion.

The next court day (Oct. 4), defendant refused to leave the courtroom holding cell. Through an open door, defense counsel advised defendant to come into

court. Defendant refused: "You all know you are lying about all this . . . . [Y]ou can keep trying to change records and everything, but people are investigating this." The court found defendant waived his right to be present. It turned on a speaker and opened the holding cell windows and doors so defendant could see and hear "what is going on in here."

The court also found defendant was stalling to keep the case from the jury. It stated: "The Court wants to also put something on the record that all this activity that occurred on Thursday afternoon, the five *Marsden* motions, the continually interrupting these proceedings for absolutely frivolous matters, telling his defense attorney that, you know, he was going to rebuke her and Satan be rebuked, what has happened here this morning is basically Mr. Simmons doesn't want this case to go to the jury because he has heard the evidence and he knows that the evidence is difficult for him to sit here and listen to in court. It is a strong case for the People. Mr. Simmons does not wish to have this case go to the jury, and as a result he is trying to interrupt this case and is making – trying to make a mockery out of the court system." It continued: "The court believes [his refusal to enter the courtroom] is an attempt on his part to just obstruct, delay and not let this trial go forward."

Counsel argued the admissibility of various exhibits in defendant's absence. Defense counsel objected to four exhibits containing account management tool documents for the "Kashmin7600@yahoo.com" account (exhibits 30, 33, 35, 44). These Yahoo documents also contained: (1) the account creator's date of birth, exactly one year different from defendant's date of birth (exhibit 30); (2) an e-mail receipt from Photobucket to "Patrick Simmons" for posting Doe's Internet advertisement, and e-mails responding to that advertisement (exhibit 35); and (3) the account user's profile picture — a photograph of defendant — and IP addresses for a computer that accessed the account (exhibit 44). Defense counsel also objected to an exhibit containing documents from a Mocospace profile page, including photographs of defendant and the IP address of

a computer that accessed the account (exhibit 34). Finally, defendant objected to an exhibit from C M Leader Venture Inc., which showed the IP address range for the Travelodge computer (exhibit 46). The court admitted all pursuant to the hearsay exception for business records. (The court had previously admitted over objection Doe's Internet advertisement from Backpage and a Backpage invoice to Kashmin7600@yahoo.com (exhibit 13) and MetroPCS documents for defendant's cell phone, including texts to and from Doe's clients (exhibit 23).) After this discussion and a short recess, defendant agreed to sit at counsel table. Counsel argued jury instructions and gave closing arguments without any disruption from defendant.

The next day (Oct. 5), the court was informed defendant refused to leave the jail. The court concluded that defendant "just doesn't want to participate in the trial any longer, and the court believes that there is good cause to proceed without him." The court then instructed the jury, which retired to deliberate.

That afternoon, the jury announced its verdict in defendant's absence. It found him guilty on both counts of pimping, the sole count of pandering by procuring, and one count of misdemeanor battery. The jury was unable to reach verdicts on the other two misdemeanor battery counts — the court later dismissed them.[3]

Court reconvened the next day (Oct. 6) for a bifurcated bench trial on defendant's alleged prior prison term. Defendant remained at the jail. The court allowed defense counsel to go there to speak with him. Defense counsel returned and reported defendant had been transferred to the jail's "medical/mental health ward" "in a safety gown." The deputies there would not tell her why that happened and refused to let her see him. They did tell her a "safety gown is typically used when the inmate may be a danger to self." The bailiff called the jail and was told defendant was "completely

---

[3] Earlier, the court entered a judgment of acquittal on the count of selling a person for immoral purposes. (See § 1118.1.)

unresponsive . . . just staring at the ceiling" when the deputies tried to transport him to court that morning.

The court granted defense counsel's request to continue the bench trial so defense counsel could find out what was happening with defendant. But it stated: "My gut feeling is that Mr. Simmons seemed okay during the trial . . . until the evidence started to mount up against him, in which case he basically just wanted to disrupt the trial."

Meanwhile, a probation officer attempted to interview defendant. Defendant declined to participate. He stated that he was upset over how he was represented at trial and did not want to attend the sentencing hearing.

Defendant was present at the next court date (Oct. 27), when the court conducted the bench trial and sentencing hearing. Defense counsel did not report on defendant's mental state and voiced no concerns about his competence. And defendant behaved appropriately. The court found the prior prison term allegation true.

At the sentencing hearing, defendant's mother stated that he had "gone through a lot as a young man." He had been "abused . . . [i]n many ways" by his father and she took him to "counselors to help me understand better his state of mind." But she did not claim he had ever been diagnosed with any mental illness. Defendant's grandmother stated defendant "is a very warm and loving person, but he can set up . . . a wall of protection . . . ." She did not claim he had any psychological issues. The court told defendant: "You're smarter than most of the people that come through this courtroom. . . . You're a smart guy. And I agree with your family that you could have a future if you decide that that's what you want to do." It imposed a total term of seven years in state prison.

DISCUSSION

The Court Did Not Err by Declining to Declare a Doubt as to Defendant's Competency

Defendant contends that the trial court should have declared a doubt as to his competency and ordered a competency evaluation. He relies upon his multiple *Marsden* requests, his claims that defense counsel was collaborating with the prosecution, his references to Satan and the FBI, his refusals to leave the holding cell and the jail, and his transfer to the medical/mental health unit where he was placed in a safety gown.

"A person cannot be tried or adjudged to punishment while that person is mentally incompetent." (§ 1367, subd. (a).) A defendant's trial while incompetent violates state law and federal due process guarantees. (*Pate v. Robinson* (1966) 383 U.S. 375, 385; *People v. Pennington* (1967) 66 Cal.3d 508, 516-517.) A defendant is mentally incompetent to stand trial if, "as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner." (§ 1367, subd. (a).)

A defendant is presumed mentally competent unless proved otherwise by a preponderance of the evidence. (§ 1369, subd. (f).) But that presumption may be rebutted by evidence "including the defendant's demeanor, irrational behavior, and prior mental evaluations." (*People v. Rogers* (2006) 39 Cal.4th 826, 847 (*Rogers*).) "If a defendant presents substantial evidence of his lack of competence and is unable to assist counsel in the conduct of a defense in a rational manner during the legal proceedings, the court must stop the proceedings and order a hearing on the competence issue. [Citations.] In this context, substantial evidence means evidence that raises a reasonable doubt about the defendant's ability to stand trial. [Citation.] . . . . The court's decision whether to grant a competency hearing is reviewed under an abuse of discretion standard." (*People v. Ramos* (2004) 34 Cal.4th 494, 507 (*Ramos*).)

"A trial court's decision whether or not to hold a competency hearing is entitled to deference, because the court has the opportunity to observe the defendant during trial." (*Rogers, supra,* 39 Cal.4th at p. 847.) An appellate court is generally "'"in no position to appraise a defendant's conduct in the trial court as indicating insanity, a calculated attempt to feign insanity and delay the proceedings, or sheer temper."'" (*People v. Marshall* (1997) 15 Cal.4th 1, 33 (*Marshall*).) Similarly, "[a]lthough trial counsel's failure to seek a competency hearing is not determinative [citation], it is significant because trial counsel interacts with the defendant on a daily basis and is in the best position to evaluate whether the defendant is able to participate meaningfully in the proceedings [citation]." (*Rogers,* at p. 848.)

"[A] defendant must exhibit more than bizarre, paranoid behavior, strange words, or a preexisting psychiatric condition that has little bearing on the question of whether the defendant can assist his defense counsel." (*Ramos, supra,* 34 Cal.4th at p. 508.) A defendant's "paranoid distrust of the judicial system" does not suffice. (*People v. Welch* (1999) 20 Cal.4th 701, 742 (*Welch*) [defendant believed "his counsel was in league with the prosecution"]; accord *People v. Davis* (1995) 10 Cal.4th 463, 525 (*Davis*) [defendant believed he was "'railroaded"]; *Marshall, supra,* 15 Cal.4th at p. 33 [defendant believed "the President and Governor were conspiring against him"].) Nor does a "refusal to sit at the counsel table" or other lack of cooperation. (*Davis,* at p. 528; see also *id*. at p. 526 & fn. 23 [defendant "remained in the doorway of the courtroom" to avoid "'sitting here listening to lies about [him]'"].) Nor does an "emotional and physical reaction to the guilt verdicts" (*id*. at p. 527) or even being placed on suicide watch (*Rogers, supra,* 39 Cal.4th at p. 847-848).

Here, we have no grounds to second-guess the court. Nothing in the record hinted at any competency issue until the prosecution began wrapping up its case. No "prior mental evaluations" showed defendant suffered from any psychological issue. (*Rogers, supra,* 39 Cal.4th at p. 847.) Defense counsel never disputed defendant's

competence — not even at the sentencing hearing, which took place after his transfer to the medical/mental health unit.[4] (See *Rogers*, at p. 848 [defense counsel "is in the best position to evaluate whether the defendant is able to participate meaningfully in the proceedings"].) At the sentencing hearing, his mother and grandmother did not identify any prior diagnosis of mental illness. And defendant behaved impeccably during the first three days of trial, and again at the sentencing hearing. The court even observed defendant was "smarter than most of the people that come through [his] courtroom." (See *id*. at p. 849 [noting "[d]efendant's intelligence was above average"].)

The court could reasonably discount conduct defendant exhibited only after he heard three days of "a strong case for the People." Defendant's repeated *Marsden* requests and accusations of "corruption" and "false documents" did not compel a competency hearing. (See *Welch*, *supra*, 20 Cal.4th at p. 742 [; *Davis*, *supra*, 10 Cal.4th at p. 525; *Marshall*, *supra*, 15 Cal.4th at p. 33.) Nor did his "strange words" (*Ramos*, *supra*, 34 Cal.4th at p. 508), like his references to Satan and the FBI. Nor did his refusals to come to court or sit with counsel. (See *Davis*, at pp. 527-528.)

Having observed defendant's demeanor throughout the trial, the court could reasonably conclude defendant simply did "not wish to have this case go to the jury" and was trying to "obstruct, delay and not let this trial go forward." (See *Rogers*, *supra*, 39 Cal.4th at p. 847 [trial court "entitled to deference, because [it] has the opportunity to observe the defendant during trial"]; see also *Marshall*, at p. 33 [trial court can detect """a calculated attempt to feign insanity and delay the proceedings"""].)

---

[4] No evidence showed defendant's transfer implicated his ability to understand the proceedings or assist in his defense. "'[P]sychiatric testimony that defendant is immature, dangerous, psychopathic, or homicidal or such diagnosis with little reference to defendant's ability to assist in his own defense'" is not substantial evidence of incompetence. (*Welch*, *supra*, 20 Cal.4th at p. 781; accord *Rogers*, *supra*, 39 Cal.4th at p. 847-848 [defendant placed on suicide watch].) In this case, there is no psychiatric testimony at all — just the bare, unexplained fact of the transfer itself.

Defendant finds no support in cases like *People v. Murdoch* (2011) 194 Cal.App.4th 230, 237. In that case, there was substantial evidence of the defendant's incompetence. (*Id.* at p. 239.) The defendant defended himself on the theory his assault victim was "not a human" — the victim lacked "shoulder blades" that are "'symbolic of angelic beings.'" (*Id.* at p. 233.) Two doctors had concluded the defendant was severely mentally ill and competent only if he remained on his medication. (*Ibid.*) But they knew defendant took his medication only "'sometimes'" and warned the court he could decompensate. (*Ibid.*)

None of the *Murdoch* factors exist in this case. No medical experts ever opined defendant suffered from any mental illness. Defendant's competence was not contingent upon his continued use of medication. And unlike the *Murdoch* defendant whose delusional thoughts permeated the trial, here defendant began acting up only after sitting through a devastating display of his guilt. (Cf. *Davis*, *supra*, 10 Cal.4th at p. 527 [an "emotional and physical reaction to the guilt verdicts" did not suggest incompetence].) In sum, the court permissibly declined to declare a doubt as to defendant's competence.

The Admission of Inadmissible Hearsay Documents Was Harmless

Defendant contends that Yahoo documents (exhibits 30, 33, 35, and 44) and the other Internet documents (exhibits 13, 23, 34, and 46) were inadmissible hearsay. He claims each document was offered to prove the truth of the matters asserted. But he asserts the Yahoo documents did not fall within the business records exception because they were not trustworthy. And he contends the other Internet documents did not fall within that exception because the custodians' affidavits were inadequate.

Hearsay is admissible if it falls within the business records exception. "Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if: [¶]

(a) The writing was made in the regular course of a business; [¶] (b) The writing was made at or near the time of the act, condition, or event; [¶] (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and [¶] (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness." (Evid. Code, § 1271.) As an alternative to giving live testimony, the custodian may submit a proper affidavit with the record.[5] (Evid. Code, § 1561.)

The Attorney General concedes the custodian affidavits for the Backpage, MetroPCS, Mocospace, and CM Leader (exhibits 13, 23, 34, and 46) were inadequate to qualify them as business records.[6] The Attorney General asserts the Yahoo documents (exhibits 30, 33, 35, and 44) were not offered for hearsay purposes and, even if they were, the Yahoo custodian's testimony qualified them as business records. But primarily, the Attorney General contends defendant cannot show any prejudice from the admission of the challenged documents.

We agree any error in admitting these documents was harmless due to the abundant evidence of guilt. Most damning was Doe's testimony. She testified defendant talked her into prostituting herself for him in Orange County, placed internet advertisements that attracted customers, and hit her.

---

[5] The affidavit must provide: "(1) The affiant is the duly authorized custodian of the records or other qualified witness and has authority to certify the records. [¶] (2) The copy is a true copy of all the records described in the subpoena duces tecum, or pursuant to subdivision (e) of Section 1560 the records were delivered to the attorney, the attorney's representative, or deposition officer for copying at the custodian's or witness' place of business, as the case may be. [¶] (3) The records were prepared by the personnel of the business in the ordinary course of business at or near the time of the act, condition, or event. [¶] (4) The identity of the records. [¶] (5) A description of the mode of preparation of the records." (Evid. Code, § 1561.)

[6] None of the certifications set forth "the mode of preparation of the records." (Evid. Code, § 1561, subd. (5).) All except the MetroPCS certification failed to set forth "[t]he identity of the records." (*Id.*, subd. (4).) The Backpage and Mocospace certifications also failed to state the records were "true cop[ies] of all the records described in the subpoena duces tecum." (*Id.*, subd. (2).)

Doe's account was amply corroborated. The jury heard her 911 calls. The Travelodge clerk verified defendant used its computer. A police officer confirmed someone used the Travelodge computer to access adult websites and a Mocospace page for Kashmin7600 that contained photographs of defendant and his green Camaro. A detective testified defendant's cell phone rang when he called the telephone number listed on Doe's internet advertisement on Backpage. The customer testified he saw defendant leave Doe's room and wait while Doe told the customer that defendant was pimping her, beating her, and keeping her from her child. A police officer testified about Doe's bruises. An expert explained how pimps operate — the pattern matched Doe's testimony about defendant. And one of defendant's prior victim's testified he hit her and made her work as a prostitute.

At most, the challenged documents helped show the specific links in the chain between defendant and Doe's Internet advertisements. But the documents were cumulative of other evidence on that specific point, and evidence generally of defendant's guilt. So even if the documents were excluded, it is not "reasonably probable that a result more favorable to [defendant] would have been reached in the absence of the error."[7] (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

---

[7] Defendant suggests the error should be evaluated under the higher standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 24. But that standard applies when admission of testimonial hearsay violates the confrontation clause. (*People v. Geier* (2007) 41 Cal.4th 555, 597, 608.) Defendant fails to show the challenged documents were testimonial. He similarly fails to support his amorphous assertion of a due process violation.

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

ARONSON, ACTING P. J.

FYBEL, J.